United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7062

United States Court of Appeals

For the Second Circuit

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P/S

MARIA NURSE, *et al.*,
Plaintiffs-Appellants,

DARLENE K. WILLIS, individually and on behalf of all others similarly situated,
Plaintiff-Intervenor,

against

ALLIED MAINTENANCE CORPORATION, *et al.*,
Defe dants,

SHEA GOULD CLIMENKO KRAMER & CASEY,
Appellants.

PLAINTIFFS-APPELLANTS' BRIEF IN REPLY TO THE BRIEF *AMICUS CURIAE* OF PLAINTIFF-INTERVENOR

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PRELIMINARY STATEMENT

This brief is submitted in reply to the brief amicus curiae ("amicus brief") of plaintiff-intervenor Darlene K. Willis ("plaintiff-intervenor") and in response to the supplemental memorandum filed by the District Court on May 27, 1976, three days subsequent to the filing by counsel for plaintiffs-appellants of their principal brief herein. The Court is respectfully referred to our principal brief for a complete statement of this case, including prior proceedings herein, and related actions.

We respectfully submit that plaintiff-intervenor's brief carefully ignores or artfully manipulates facts and evidence adduced at hearings on remand in the District Court on March 5, 11 and 12, 1976. Those hearings were held pursuant to an order of this Court for the limited purpose of adducing additional proof on the issue of the disqualification of Shea Gould Climenko & Casey (formerly Shea Gould Climenko Kramer & Casey and hereinafter "Shea Gould") as counsel for plaintiffs herein (A 004).* The

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*Parenthetical page references preceded by the letter "A" are to the Appendix heretofore submitted by appellants with their principal brief. Where appropriate, the name of a witness or an exhibit designation is also given.

evidence adduced on remand is extensively and accurately reviewed in appellants' principal brief (p. 8, et seq.). Shea Gould contends that, in contrast, the brief submitted by plaintiff-intervenor is a distorted presentation of the history of the underlying proceedings herein and of Shea Gould's role in seeking and obtaining equal pay for its clients, the female members of Local 32J.

The dispute between plaintiff-intervenor and Shea Gould arises out of their respective views of the role of counsel for a union when asked to advise and represent its individual members. Briefly, it is Shea Gould's position that as long as counsel neither waives, prejudices nor compromises any claim which individual members may have against their association as an entity, counsel may represent such individual members in litigation designed to secure from some third party those objectives with regard to which the union and its members have a common interest. Plaintiff-intervenor contends that whenever members have a potential claim against their union, the union's counsel should be disqualified from representing them. Plaintiff-intervenor has attempted to tailor the facts here to conform to her view and, in doing so, has distorted the record in a number of instances. We will attempt here to correct

some of the more significant distortions.

Distortion of the Record

It is appropriate to note that many of the "facts" to which plaintiff-intervenor refers (amicus brief, p. 15, et seq.) as having been revealed by evidence produced during the course of this litigation are simply not supported by the record; to the contrary, they find support only in unproven allegations made in affidavits of plaintiff-intervenor's counsel. We submit that it is no longer appropriate to rely on unsupported allegations and on affidavits of counsel. Three hearings were held on remand in the District Court for the specific purpose of adducing additional proof on the issue of disqualification (supra, at 1). At those hearings, plaintiff-intervenor was given every opportunity to prove her allegations. The District Court even allowed her to submit additional documents after the close of the hearings.

(a) Allegedly Discriminatory Collective Bargaining Agreements

As this Court is well aware, the instant action is one of approximately 75 lawsuits commenced by Shea Gould on behalf of individual members of Local 32J to

recover damages under the Equal Pay Act. Willis v. Allied Maintenance Corporation (75 Civ. 955) was commenced by plaintiff-intervenor after the case at bar and after most of the Equal Pay cases filed by Shea Gould.* Plaintiff-intervenor asserts class action and individual claims in Willis against Local 32J and divers employers of the members of Local 32J, alleging violation of Title VII of the Civil Rights Act of 1964 and other statutes. The constant refrain of plaintiff-intervenor in the brief which she filed herein as "friend" of this Court is that unequal terms and conditions are incorporated in the collective bargaining agreements which Local 32J negotiated with Shea Gould's assistance.** Contrary to plaintiff-intervenor's unsupported allegations, there are no unequal terms or conditions within the relevant agreements herein. Plaintiff-intervenor's undocumented reference to non-existent sex-based wage differentials reflects her limited understanding of the nature of this action, pursuant to which members of

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* Indeed, by the time the Willis case was commenced, settlement negotiations had already begun in the Equal Pay cases commenced by Shea Gould.

** See infra at 18 for representative examples of plaintiff-intervenor's unsupported allegations.

Local 32J, represented by Shea Gould, have attempted to redress the inequality which has resulted from the refusal of their employers to adhere to the neutral and non-discriminatory terms and conditions of the aforesaid agreements.*

(b) Shea Gould's Alleged Violation of Ethical Restraints

Plaintiff-intervenor's manipulation of the record herein continues apace. The statement (amicus brief, p. 8) that "Shea Gould had violated certain ethical restraints by soliciting waivers from individuals known to be represented by counsel" is a characteristic distortion. The record is best untangled by the following brief history.**

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* The terms and conditions of the agreements referred to above are set forth below, infra at 19. The aforesaid terms and conditions of the relevant collective bargaining agreements are also the subject of extensive examination in appellants' principal brief (p. 10, et seq.).

** Many of the facts set forth below were called to the attention of this Court in an affidavit submitted by Martin I. Shelton, a member of the Shea Gould firm, in opposition to plaintiff-intervenor's motion for leave to file a brief and appear as amicus curiae on this appeal. Obviously, whether the participation of an amicus curiae is to be allowed is an issue which is referrable to the sound discretion of this Court. Having allowed such participation in this instance, many of the facts set forth in the aforesaid affidavit now serve, we submit, to clarify certain of the distortions of the record which have been engendered by the misleading presentation of plaintiff-intervenor in her brief.

In or about June of 1975, the parties in the Equal Pay cases reached a tentative settlement which was subject to the approval of the Department of Labor and to the consent of the individual plaintiffs in the Equal Pay Act cases. The Department of Labor initially approved the settlement and, in accordance with the settlement agreement, the parties to the Equal Pay Act cases began, in or about August of 1975, to solicit consents to the proposed settlement from plaintiffs and other female members of Local 32J. The consents were solicited openly and each member of Local 32J was given a copy of the settlement agreement and a copy of the complaint in the Willis action because of the possibility that the proposed compromise of the Equal Pay actions might affect the claims asserted in the Willis case. It was the aforesaid solicitation which gave rise to plaintiff-intervenor's first allegation that Shea Gould was affected by a conflict of interest. In early September of 1975, plaintiff-intervenor sought a temporary restraining order and preliminary injunction in the Willis case in an attempt to prohibit the continued solicitation of consents. In fact, at that point in time, the Willis case had not yet been declared a class action and, indeed, plaintiff-intervenor's motion to have the Willis case declared a class action had not

then even been submitted to the Court. Nevertheless, plaintiff-intervenor claimed that the proposed settlement by other women of their own individual claims was a threat to her rights, and her application for a preliminary injunction did assert that Shea Gould's representation of the plaintiffs in the Equal Pay cases resulted in a conflict of interest. However, Shea Gould did not then and does not now represent any party in the Willis case; Shea Gould did not receive any notice of the application for a preliminary injunction and did not participate in any way in the hearing on that application, which was denied by the District Court.

(c) Department of Labor Action on the Proposed Settlements

Reference to the foregoing facts, which are a matter of record herein, belies the misleading impression plaintiff-intervenor apparently seeks to conjure up when she states (amicus brief, p. 9), without more, that "[t]he proposed Nurse settlement, to which plaintiff-intervenor continues to object, had been rejected by the United States Department of Labor (DOL)." From that bare statement it is impossible to discern that the settlement had indeed been approved by the Department of Labor approximately two months prior to its withdrawal of approval - a

fact which, we submit, places in proper perspective plaintiff-intervenor's meritless assertion (amicus brief, p. 17) that the proposed settlement "failed to provide even minimal compliance with the Equal Pay Act." The undistorted record reveals that the Department of Labor, by letter dated September 10, 1975, withdrew the approval which it had given to the Equal Pay settlement and insisted that a settlement of the Equal Pay actions would have to provide for immediate compliance with the Equal Pay Act. The Department of Labor made it clear, however, that the defendant employers need not pay more than they would have paid under the original proposed settlement in order to comply with the Equal Pay Act but could, by deferring the increases provided for in the original agreement, comply with the Act and secure the Department's approval, without incurring any additional expense. Shea Gould, together with the Department of Labor and the defendants in the Equal Pay actions, negotiated a further industry-wide settlement agreement which satisfied the Department of Labor and received the approval of the District Court (see infra at 45).

(d) Shea Gould's Objections to the Willis Settlement

Following the settlement agreement negotiated by Shea Gould, plaintiff-intervenor settled her own case against defendant Allied Maintenance Corporation by agreeing to a recovery for the members of her alleged class which was identical to that obtained by Shea Gould in the industry-wide settlement, and a substantially higher recovery for herself. Thus, while the members of the Willis class were to receive immediate equal pay plus a $100 payment for back-pay claims, plaintiff-intervenor Willis herself, the purported representative of the class, was to receive $10,500 in settlement of her claims. The curious fact about the Willis settlement was that it purported to bind all female members of Local 32J who were employed by Allied, including all of the plaintiffs in this action, even though the Court had still not decided the class action motion in the Willis case. Plaintiff-intervenor was, in effect, purporting to settle a class action without ever having been declared a class representative.

As we will show below, it was Shea Gould's attempt to protect its clients in this anamolous situation which prompted plaintiff-intervenor's attempt to disqualify Shea Gould.

One of the most egregious allegations put forth by plaintiff-intervenor is her contention (amicus brief, pp. 11, 12) that Shea Gould "circulated to Nurse plaintiffs and Willis class members false and misleading information about the proposed settlement in Willis" in an effort to "discredit and thereby destroy the Willis settlement in retaliation against plaintiff-[intervenor] for continuing to pursue claims against Local 32J . . . evidently to coerce plaintiff to abandon those claims." Plaintiff-intervenor's distortions notwithstanding, the underlying record will in fact reveal that because Shea Gould's clients, the plaintiffs herein, were purportedly affected by the proposed settlement in the Willis case and because

the proposed settlement included several features which Shea Gould regarded as detrimental to its clients, Shea Gould attempted to make its objections to the settlement known to the District Judge on January 27, 1976.* Judge Stewart refused, however, to hear Shea Gould on the ground that it represented no party in the Willis case and, accordingly, was without standing. He advised Shea Gould to make its views known directly to its clients. It was the attempt of Shea Gould to comply with the Court's advice and to convey its bona fide objections to its own clients which prompted plaintiff-intervenor's motion to disqualify Shea Gould. Shea Gould's activities were not, as plaintiff-intervenor suggests, a threat to her rights, but rather an attempt to prevent plaintiff-intervenor's settlement from harming Shea Gould's clients.

(e) Proceedings on Plaintiff-Intervenor's Motion to Disqualify

During the argument which was held on the afternoon of February 17, 1976 with respect to whether the Court should sign the order to show cause in support of the motion

*The record will also show that prior to that time Shea Gould had asked Mr. Dannett, counsel for Allied, for an opportunity to review the Willis settlement documents, but had not been given that opportunity. Thus, Shea Gould was forced to try to make its objections known directly to the Judge.

to disqualify Shea Gould, the attorneys for plaintiff-intervenor announced that they had entered into a supplemental memorandum of understanding with defendant Allied which, in effect, guaranteed that nothing in the proposed Willis settlement would deprive any of the plaintiffs in the Nurse case or any other member of the Willis class of any benefits which they had obtained under a collective bargaining agreement. The supplemental memorandum of understanding which changed or, at least, clarified the proposed Willis settlement was a concession by plaintiff-intervenor that Shea Gould's objections to her proposed settlement were valid and legitimate. Thus, it is simply misleading for plaintiff-intervenor to state (amicus brief, p. 13) that on the following day Shea Gould consented to substantially all of the relief sought in plaintiff-intervenor's application. In fact, Shea Gould withdrew its opposition to the Willis settlement because the settlement had been clarified and improved as a result of its objections. Because Shea Gould withdrew its objections, the attorneys for plaintiff-intervenor withdrew their motion to disqualify Shea Gould.

(f) Shea Gould's Participation in the Willis Proceedings

In the face of a record which Martin I. Shelton,

a member of the Shea Gould firm, took pains to clarify (A 122, 123),* plaintiff-intervenor still has the temerity

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*The relevant portion of the transcript follows:

"Q. But the Union was represented by the Shea firm at those sessions?

"A. It was.

MR. SHELTON: I don't know if there was more than one session, your Honor. I wish that could be clarified.

THE COURT: Yes, Mr. Baumann, can you tell us?

THE WITNESS: As far as I know your Honor, there was only one session in which Mr. Stergios, who was representing us in that matter --

MR. SHELTON: Mr. Stergios, your Honor, is an associate in my firm.

THE WITNESS: That he attended with the EEOC, with whom exactly in the EEOC, I don't know.

* * *

MR. SHELTON: I think it's clear as far as this witness knows of only one session. That's all. The reason I had put it your Honor was because Mrs. Pinzler, I believe, inadvertently said sessions in the plural and I think she had misspoke."

to suggest that "Shea Gould represented Local 32J in Willis proceedings before the EEOC." (Amicus brief, p. 15.) The record reveals that subsequent to an ex parte investigation conducted by an EEOC hearing officer who issued a "probable cause determination" without affording Local 32J an opportunity to produce contrary evidence, the Union, pursuant to EEOC administrative procedure, was invited to participate in a conciliation proceeding. The Union, willing to participate in the aforesaid conciliation proceeding, was represented at one such session by an attorney associated with the Shea Gould firm. The conciliation proceeding did not succeed, and there was no further participation by anyone from either the Union or the Shea Gould firm in the Willis administrative proceeding.*

(g) Other Distortions of the Record

*The EEOC's "probable cause determination" was apparently based upon the face of pre-1972 collective bargaining agreements which classified cleaners as "male" and "female". As more fully set forth below, infra at 19, these were merely short-hand labels which reflected a predominance of men in what was really a "heavy" cleaning category, and of women in a "light" cleaning category.

Plaintiff-intervenor's attempt to suggest that the EEOC had moved to intervene in the instant action (amicus brief, p. 9) is also objectionable. The EEOC moved to intervene only in the Willis case and, plaintiff-intervenor's contrary implication notwithstanding, has displayed absolutely no interest in intervening in the Nurse action.

Plaintiff-intervenor's refusal to acknowledge relevant portions of the underlying record herein is a chronic problem which consistently plagues her presentation. For instance, plaintiff-intervenor contends (amicus brief, p. 19) that "Local 32J failed to demand equal pay from the employer organization responsible for negotiating industry-wide terms and conditions of employment until 1974 . . . ." The testimony elicited during Mr. Shelton's cross-examination of Marvin Dicker, a member of the law firm which acts as general counsel to the employer organization to which plaintiff-intervenor refers, effectively belies plaintiff-intervenor's contention in this regard (A 148, et seq.).

The allegation that Shea Gould was responsible for deciding which parties to sue (amicus brief, p. 16)

is directly contrary to the facts adduced at the hearings referred to above and manifests a striking difference between the respective views of plaintiff-intervenor and Shea Gould of the role of counsel for a union when asked to advise and represent individual members thereof (supra, at 2). The Court is respectfully referred to the discussion in our principal brief (pp. 22, 23) of Shea Gould's alleged responsibility for choosing defendants.

The cavalier assertion (amicus brief, p. 15) that "plaintiff union members were not given a choice of counsel" is a self-serving and objectionable inaccuracy. Plaintiffs herein had the right to seek and obtain any counsel of their choice; at no time was it suggested by anyone that only Shea Gould could pursue the underlying issues herein.

We believe that an accurate reading of the record will confirm the fact that Shea Gould has consistently and successfully endeavored to place before this Court a full and undistorted presentation of the facts attending these proceedings, in stark contrast to plaintiff-intervenor's exercise in selective distortion. We also note that Judge Stewart's supplemental memorandum of May 27, 1976, in

which Judge Stewart fails to acknowledge the evidence adduced at the hearings on remand, suffers from the same limitations as plaintiff-intervenor's brief.

POINT I

PLAINTIFF-INTERVENOR'S ALLEGATIONS AGAINST LOCAL 32J ARE UNPROVEN AND UNTENABLE

Plaintiff-intervenor's invocation of allegedly relevant authority, like her purported "statement of the case," is replete with misstatements of fact and law. Point I of her brief begins in characteristic fashion:

> "On their face, the collective bargaining agreements incorporate discriminatory terms and conditions of employment." (Amicus brief, p. 23.)

In support of the foregoing, plaintiff-intervenor makes oblique reference to Judge Stewart's supplemental memorandum dated May 27, 1976. The relevant portion thereof, however, belies plaintiff-intervenor's inaccurate representation, since Judge Stewart actually commented as follows:

> "The collective bargaining agreements prior to 1971 are admittedly discriminatory on their face." (Supplemental memorandum, p. 11; emphasis added.)*

*It should be noted that even Judge Stewart's finding is questionable. Although the collective bargaining agreements prior to 1972 classified cleaners as "male" and "female", these respective categories were not restricted to men or women. The short-hand labels merely reflected a predominance of men in what was really a "heavy" cleaning category, and of women in a "light" cleaning category.

In view of the serious charge of impropriety leveled against Shea Gould by plaintiff-intervenor, it is objectionable for her to state, without reference or documentation, that "[a] glance at the disparate wage scales for men and women reveals" that the collective bargaining agreements herein "incorporate or perpetuate discrimination." (Amicus brief, p. 29; emphasis added.) The "glance" to which plaintiff-intervenor refers is a woefully inadequate substitute for documented analysis. Contrary to plaintiff-intervenor's unsupported assertion, there is no "disparate wage scale for men and women" within the relevant agreements herein. Reference to the agreement which became effective on May 1, 1971 (plaintiff's Exh. 1) reveals that members of Local 32J are divided into two categories: "Maintenance Cleaners I", who generally perform "light cleaning tasks", and "Maintenance Cleaners II", who generally perform "heavy cleaning" tasks.* The pay

*The aforesaid agreement was negotiated with The Building Service League ("BSL"). Cf. the agreement (Court's Exh. I) negotiated with The Realty Advisory Board of Labor Relations, Inc. ("RAB"), which agreement became effective on January 1, 1972. This agreement contains only an "Office Cleaner" category. The "office cleaners" represented by Local 32J under the RAB agreement generally performed "light cleaning" corresponding to the Maintenance I category (Baumann, A 35). Although the "office cleaners" are mostly women, the category is not restrictive

differential therein is based solely on job content. Indeed, the specific job content of the Maintenance I and Maintenance II categories was reduced to writing (Plaintiffs' Exh. 3) at the insistence of Local 32J when the union began to receive complaints from its members that those in the "light cleaning" category were being required by employers to do work which should have been done by those in the "heavy cleaning" category. Those categories, however, are not restricted to male or female membership. There have been some men in the Maintenance I category and some women in the Maintenance II category. The uncontradicted testimony of the President of Local 32J reveals that the Union has never discouraged or prevented female members from seeking jobs in the higher paying Maintenance II category (Baumann, A 30, 34). Thus, when

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(Footnote cont'd)

and some men do work as "office cleaners" (Baumann, A 28). As set forth in our principal brief (p. 11), in buildings governed by the RAB agreement, the "heavy cleaning" is not performed by Local 32J office cleaners but by "porters" who are represented by Local 32B, a different Union (Baumann, A 39). The Local 32B porters received a rate of pay which was higher than the pay of the "office cleaners" and approximately equal to the pay received by Local 32J's Maintenance II cleaners pursuant to the BSL agreement (Baumann, A 39).

plaintiff-intervenor makes undocumented reference to a sex-based wage differential which simply does not exist, she misleads this Court and manifests a misapprehension of the nature of the underlying action herein; an action pursuant to which members of Local 32J, represented by Shea Gould, have attempted to redress the inequality which has resulted from the refusal of their employers to adhere to the well-defined terms and conditions of the job categories set forth above.

Title VII

Shea Gould acknowledges the fact that a non-discriminatory collective bargaining agreement may, in certain circumstances, result in the imposition of liability upon a union. It is well-settled, in this regard, that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibits present practices which have the practical effect of continuing past discrimination. See, e.g., Palmer v. General Mills, Inc., 513 F.2d 1040, 1042 (6th Cir. 1975). Thus, "[w]hen the employer or union has discriminated in the past, and its present policies renew or exaggerate that discrimination, those policies must yield" in the absence of an overriding legitimate purpose. Carey v.

Greyhound Bus Co., Inc., 500 F.2d 1372, 1377 (5th Cir. 1974). Assuming, arguendo, that some present practice of Local 32J, reflected in the collective bargaining agreements herein, may be said to continue the effects of some discriminatory policy of the past, it is an incontrovertible fact of this litigation that Shea Gould, acting as counsel to members of Local 32J in an action brought pursuant to the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), has neither waived nor prejudiced any potential claim individual members may have against their association as an entity. Moreover, and in accord with the contention of Shea Gould that no colorable Title VII claim can properly be brought against Local 32J, plaintiff-intervenor has been consistently unable to refer appellants or this Court to even a single present policy of Local 32J which may be said to renew or perpetuate discrimination. A brief explication of the facts of the inapposite Title VII decisions invoked by plaintiff-intervenor is in order.

Including Palmer v. General Mills, Inc., supra, and Carey v. Greyhound Bus Co., Inc., supra, plaintiff-

intervenor invokes no fewer than six Title VII cases involving seniority systems which, although facially neutral, clearly had the practical effect of continuing past injustices. The Palmer decision is a representative example:

> "When an employee transfers from one department to another, she loses her acquired seniority and must begin to accumulate seniority within the new department for promotion purposes. Because the plaintiffs in this case could work only in the packing department, their plant and department seniority coincided. The first opportunity for any of these women to transfer was after the implementation of the March 22, 1971 agreement, and as a result, their seniority in any new department could run only from sometime after that date.
>
> * * *
>
> "In a company where promotion is granted according to the amount of seniority acquired in an individual department, it is readily apparent that the women employees will always suffer from the disadvantage of the 1971 entry date. Although they will advance even after that date, they still cannot compete equally with male employees who were able to transfer without the restrictions of state law." 513 F.2d at 1043."

Accord Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), cert. denied, 44 U.S.L.W. 3593 (1976); Robinson v. Lorillard, 444 F.2d (4th Cir.), cert. denied, 404 U.S. 1006 (1971); and United States v. T.I.M.E. - D.C., Inc., 517 F.2d 299 (5th Cir. 1975), U.S. appeal pending.

Plaintiff-intervenor is unable to make specific reference to any aspect of the collective bargaining agreements herein which, while facially neutral, can be characterized as the embodiment of a present practice which perpetuates the effects of some discriminatory policy of the past. Plaintiff-intervenor's attempt to conjure up a non-existent sex-based wage differential cannot compensate for her failure to present any proof of discrimination at the hearings on remand.

With one exception, referred to below, the remaining cases cited by plaintiff-intervenor in the first sub-section of her brief (p. 23, et seq.) are also inapposite Title VII decisions: viz., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (whether diploma and test requirements had a manifest relationship to the employment in question; it was in the context of passing judgment on the aforesaid relationship - or lack thereof - that the Court passed certain remarks relating to the irrelevance of the employers intent in adopting said requirements); Rios v. Enterprise Ass'n. Steamfitters Local 638 of U.A., 501 F.2d 622 (2d Cir. 1974) (union had not voluntarily "cleaned house" or taken any meaningful steps to eradicate the effects of its past discrimination); and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (concerning the showing an employer

must make in order to establish that pre-employment tests, racially discriminatory in effect as opposed to intent, are sufficiently job related to survive challenge). Plaintiff-intervenor's litany of inapposite decisions also includes one case, Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973), brought pursuant to the Equal Pay Act. The Brennan decision, which is simply not relevant to the subject matter of this lawsuit, held that an employee is entitled to full compensation for his injuries even if the employer withheld his wages in good faith. "A decision to the contrary," continued the Court, "would in effect reward the employer for its discriminatory practices and punish the employees for any delay by the Secretary in prosecuting the suit." Id. at 242.

It would be disingenuous to profess surprise at plaintiff-intervenor's attempt to inundate this Court with Title VII authority. As noted above, Title VII is not implicated in the underlying action herein; moreover, Shea Gould has neither waived nor prejudiced any arguable claim individual members may have against their Local. Plaintiff-intervenor, however, in a separate action entitled Willis v. Allied Maintenance Corporation, et al., 75 Civ. 955, has asserted class action and individual claims

against Local 32J and divers employers of the Union's members, alleging violation of Title VII and other statutes. We do not think it gratuitous to note that in her guise as a "friend" of this Court, plaintiff-intervenor in effect seeks to aid her cause - at least with respect to the issue of Local 32J's potential liability - without running the risk of any adverse determination. It is more than unfortunate that, in attempting to advance her own spurious claims against Local 32J, plaintiff-intervenor misleads this Court with erroneous statements of "fact" and a series of inapposite decisions.

The Equal Pay Act

In belated recognition of the limitations which attend her resort to Title VII authority, plaintiff-intervenor turns her attention to the Equal Pay Act, and characterizes Shea Gould as an unconscientious advocate who has too readily conceded that the Equal Pay Act creates no liability on the part of Local 32J. Plaintiff-intervenor states that:

> "Conscientious advocates for the Nurse plaintiffs would not concede this point so cavalierly, especially since there is authority to the contrary. See Hodgson v. Sagner, Inc., 326 F.Supp. 371 (D.

Md. 1971), aff'd sub nom., Hodgson v. Baltimore Regional Joint Board, Amalgamated Clothing Workers of Am., 462 F.2d 180 (4th Cir. 1972), 29 C.F.R. § 800.106, and 29 U.S.C. § 206(d)(2), a part of the Equal Pay Act, which provides:

> "'No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.'" (Amicus brief, pp. 38, 39.)

Whether the Equal Pay Act affords a legal basis for either injunctive relief or monetary recovery against a union in a private action brought by employees who are members of the union was most recently analyzed in Tuma v. American Can Co., 6 E.P.D. ¶ 8842 (D.C. N.J. 1973). The Court's comprehensive review of the language and structure of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., as amended by the Equal Pay Act (adding § 206(d), upon which plaintiff-intervenor purports to rely in characterizing Shea Gould as an unconscientious advocate), clearly reveals that the Equal Pay Act "affords no legal basis for either injunctive relief or monetary recovery against the defendant Unions in a private action brought by employees who are members of said Unions." 6 E.P.D. at 5581. (Emphasis added.) The Court's analysis follows:

"The applicable statutory structure is as follows: The statutorily proscribed conduct of employers and unions is embodied in § 206(d)(1) and (2). Section 215(a)(2) makes a violation of § 206 unlawful. Section 216 establishes penalties for violations of the Act. It provides for criminal penalties, in § 216(a), for wilful violations by 'any persons.' However, § 216(b), which allows maintenance of a civil action by employees for monetary damages, provides for such liability only on the part of 'any employer.' It does not provide for private actions by employees against a union.

"This reading of the statute is supported by the Interpretative Bulletin of the Wage-Hour Administration, codified in 29 C.F.R. § 800, which is entitled to considerable weight in this Court. Roland Electrical Co. v. Walling, 326 U.S. 657, 676 (1946); United States v. American Trucking Assns., Inc., 310 U.S. 534, 549 (1940). See also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The Administrator's regulations provide for enforcement of the Act against labor organizations by either injunction proceedings instituted by the Secretary of Labor under § 217, or by criminal prosecutions for wilful violations under § 216(a). No provision is made for private damage suits against unions. 29 C.F.R. § 800. 166. The only court to consider this question has concluded, similarly, that civil liability on the part of a union is unavailable in private actions under the Act. Wirtz v. Hayes Industries, Inc. [1 E.P.D. ¶ 9874] 58 L.C. ¶ 32,085 (N.D. Ohio 1968).

"In dismissing these claims, this Court is not ruling on a District Court's equitable power to assess damages against a union in injunction proceedings instituted by the Secretary of Labor under § 217. See Hodgson v. Sagner, Inc., [3 E.P.D. ¶ 8310] 326 F. Supp. 371 (D. Md. 1971), aff'd sub nom. Hodgson v. Baltimore Regional Joint Board, [4 E.P.D. ¶ 7880] 462 F.2d 180 (4th Cir. 1972)." Id. at 5581.

As the Tuma decision clearly reveals, Hodgson v. Sagner, Inc., supra, is inappropriately invoked by plaintiff-

intervenor, dealing as it does with the narrow issue of proceedings instituted by the Secretary of Labor under § 217 of the Equal Pay Act. To characterize Shea Gould as an unconscientious advocate for the Nurse plaintiffs on the basis of this inapplicable decision is both a manipulation of relevant principles and a manifestation of plaintiff-intervenor's characteristic inability to separate fact from fancy.

Distortion of Authority

Plaintiff-intervenor also suggests that Shea Gould, by referring this Court to the decision of Walker v. Columbia University, 11 E.P.D. ¶ 10,835 (S.D.N.Y. 1976), has apparently "forgotten [its] obligations to the plaintiffs herein." (Amicus brief, p. 38.) Plaintiff-intervenor contends that in relying upon the Walker decision, Shea Gould is in effect "arguing against the precise propositon that it is obligated to take in support of the Nurse plaintiffs' claim." Id. Analysis of the Walker decision reveals the speciousness of plaintiff-intervenor's assertions.

One of the two actions before Judge Owen in Walker was brought by plaintiffs against their employer, Columbia University, and their unions, Transport Workers

Union of America, AFL-CIO, and its Local Union No. 241, alleging sex discrimination in hiring, promotion and pay in violation of the Equal Pay Act and Title VII.* The factual posture of Walker follows:

> "To maintain various of its class buildings and residence halls, Columbia University has 'light' and 'heavy' cleaners working under the direction of supervisors. It has security guards to protect these buildings. The heavy cleaners, guards and supervisors all have women among their numbers. There are no men among the light cleaners.
>
> "At all material times, Mrs. Walker and the other individual plaintiffs (collectively the 'Walker plaintiffs') were employed as light cleaners within the Buildings and Grounds Department of Columbia. The Union has been the exclusive bargaining agent for all of the University custodial and maintenance employees at Morningside Heights since about 1945.
>
> * * *
>
> "As To The Equal Pay Claims: Columbia, within its Department of Buildings and Grounds and within its Department of Resident Halls has, for at least 30 years prior to March 11, 1971, and continuing to the present, maintained separate job classifications and paid different wages for heavy cleaners and light cleaners. No male has ever applied for a light cleaner position. Some females have applied for and have been accepted as heavy cleaners." Id. at 7510.

Thus, Columbia University divided cleaning and maintenance work into "heavy" and "light" categories; the

*The second action which was before Judge Owen was brought by Peter J. Brennan, in his capacity as United States Secretary of Labor, for an alleged violation by Columbia of the E.P.A. The unions were brought in by Columbia as third-party defendants.

"light" cleaning category being exclusively female and the "heavy" cleaning category, which included some females, being predominantly male. In considering a challenge to the validity of that system, the District Court found, as a matter of fact, that the work performed by the "heavy" cleaners was substantially more difficult and required substantially more effort than that performed by the "light" cleaners. Judge Owen held, therefore, that the wage differential at issue was unobjectionable. The categories established by Columbia University are, as indicated in our principal memorandum, strikingly similar to the categories established by Local 32J's collective bargaining agreements. It is, therefore, quite clear that the wage differential in Local 32J's collective bargaining agreements, predicated upon carefully defined job content distinctions, is a valid one. The only difference between the Walker action and the case at bar is the fact that those employers who are parties defendant in the instant action failed to adhere, unlike the employer in Walker, to the demarcation line between the duties of "light" and "heavy" cleaners, thereby blurring the distinctions between the two categories. As stated in our principal memorandum, if the law is indeed in accord with

Judge Owen's decision in Walker, then plaintiff-intervenor's claims as against the Union are without basis. The only tenable claim which emerges from the factual posture of the underlying action herein is one against the employers for acting in derogation of the validly defined categories set forth above.

Plaintiff-intervenor further misleads this Court by virtue of her treatment of a decision, Rosario v. The New York Times Co., 10 E.P.D. ¶¶ 10,450 and 10,576 (S.D. N.Y. 1975), which bears closely upon the case at bar. Plaintiff-intervenor states:

> "There [in Rosario], the court found that it 'need not decide the issue of potential conflict,' 10 E.P.D. at p. 5947, because the union was stricken as a party plaintiff. Accordingly, the court's later statement, upon which Shea Gould relies, that 'I saw no conflict of interest,' 10 E.P.D. at p. 6380, is somewhat mysterious." (Amicus brief, p. 47.)

The solution to the purported mystery can be gleaned, not unexpectedly, from the facts set forth in the Rosario decision itself. The action was one for declaratory and injunctive relief from discriminatory employment practices. Judge Metzner, having granted a motion to strike the union therein as a party plaintiff,

deemed it unncessary to address the contention, interposed by the defendant employer, that counsel for plaintiffs (members of the aforesaid union) should be disqualified because they were also the attorneys for the union which represented plaintiffs under the collective bargaining agreement with the employer. The striking of the union as a party plaintiff left the Rosario action in precisely the same factual posture as the case at bar. Judge Metzner's statement that he "saw no conflict of interest," characterized by plaintiff-intervenor as mysterious, becomes quite clear upon more careful resort to the Rosario record:

> "Some time ago defendant sought to disqualify counsel for plaintiffs because they were also the attorneys for the union which represented plaintiffs under the collective bargaining agreement with defendant. The firm of attorneys is well known, experienced and able in the field of labor relations and related matters. I denied defendant's application because I saw no conflict of interest and because I knew that plaintiffs would be well represented, as their counsel so well argued.
>
> "In cases such as these, the public and private interests seem to merge. There is no doubt in my mind that plaintiffs' counsel are fully competent to protect the former as well as the latter. I daresay that plaintiffs' counsel are more conversant with the facts involved in this case than the applicant intervenor." 10 E.P.D. at 6380.

The significance of Judge Metzner's pronouncements in Rosario is not mitigated by plaintiff-intervenor's

misleading reference to the decision of Communications Workers of America v. N. Y. Telephone Co., 8 E.P.D. ¶ 9542 (S.D.N.Y. 1974), in which Judge Tyler was confronted with contentions that a union could not be a proper class representative and that individual members thereof should also be disqualified from representing the class because they were represented by the union's attorneys. The action was instituted pursuant to Title VII on behalf of nonsupervisory female employees of the New York Telephone Company and Empire City Subway Company. Plaintiffs therein alleged that defendants had deprived female employees of certain benefits of a disability income protection plan, which plan was incorporated within a collective bargaining agreement. Defendants contended that the union necessarily shared responsibility for any discrimination which might be found to derive from the plan. Thus, Judge Tyler was confronted with a collective bargaining agreement which distinguished between benefits inuring to male and female members of the union. To the contrary, the agreements negotiated by Local 32J herein are and have been since 1972 facially neutral and non-discriminatory. Another significant point of departure between the Communications decision and the case at bar may be discerned in Judge Tyler's following statement:

> "Telco asserts that since CWA represents both male and female employees of Telco, there is a serious potential conflict between the duty of the union to its male employee membership and its duty to female employee members which relates not only to the merits of the claims of discrimination but also to the remedies if such claims are sustained." 8 E.P.D. at 5358.

It is apparent that no similar remedial conflict is involved in the context of the instant action. The gravamen of the case at bar is the question of equal pay. Under the express terms of the Equal Pay Act, any remedy which may ultimately be fashioned herein may not equalize pay and benefits by lowering those of higher paid workers; rather, benefits which already inure to one class of the membership must, without diminution for anyone, be similarly extended to others. It is, then, only by reference to the foregoing facts of the Communications decision that Judge Tyler's following statement (excerpted by plaintiff-intervenor at p. 30 of her brief) can be properly understood:

> ". . . the record sufficiently establishes that the union's interest is not co-extensive with that of the members of the class." 8 E.P.D. at 5359.

At no time, however, does plaintiff-intervenor undertake an examination of the record referred to above; at no time does plaintiff-intervenor deem it expedient to call the

facts which were before Judge Tyler to the attention of this Court.

Notwithstanding plaintiff-intervenor's contention to the contrary (amicus brief, p. 30), Judge Tyler was also confronted with the very allegation which has been put forth in the instant action, viz., that the union's lawyers, who were representing the individual members of the union, were incapable of adequately pursuing the claims of the class. Obviously, it matters not whether this question is raised in the context of an attempt to disqualify an attorney or, as in the action before Judge Tyler, in the context of an attempt to disquality individual union members from being class representatives. As stated in Lynch v. Sperry Rand Corporation, 62 F.R.D. 78, 83 (S.D.N.Y. 1973):

> "There is one further question as to the ability of the individual plaintiffs to fairly and adequately protect class interests. This concerns whether they are or can be represented by competent attorneys who are in a position to represent class interests and to prosecute the action vigorously on behalf of the class."

Whether Shea Gould was in a position to represent the interests of the Nurse plaintiffs and to prosecute that action vigorously on their behalf is precisely the

issue at bar. Notwithstanding the Communications defendants' contention that the named plaintiff therein and her attorneys were infected by the union's alleged conflict of interest, Judge Tyler expressly found that the named individuals "will fairly and adequately represent the interests of the class." 8 E.P.D. at 5358.

Plaintiff-intervenor also misleads this Court by virtue of her cursory reference to the decision of Lynch v. Sperry Rand Corporation, supra, in which conflicts of interest prevented the union therein from representing a class comprised of male members; like the Communications decision excerpted above, and unlike the case at bar, Lynch involved a facially discriminatory provision of a collective bargaining agreement. The suit, brought pursuant to Title VII, was styled as a class action on behalf of all present and former male employees of defendant Sperry Rand Corporation who were participants in defendant's retirement pension plans. Specifically, the complaint charged that the plans discriminated against male employees and retirees in the following manner:

> "The essence of the charges of sex discrimination under the Sperry pension plans is (1) that women are permitted to retire on full pension at the age of 60 whereas men may not retire on full pension until the age of 65, and (2) that women are entitled to early

retirement at age 50 whereas men are not entitled to early retirement benefits until age 55." 62 F.R.D. at 80.

The challenged provisions were incorporated in a collective bargaining agreement. Defendant alleged, therefore, that the union necessarily shared responsibility for any discrimination which might be found to derive from the plans. Like Judge Tyler in the Communications decision, the Court in Lynch was confronted with a collective bargaining agreement which distinguished on its face between benefits inuring to male and female members of the union. Plaintiff-intervenor's constant distortion of the record at bar mandates re-emphasis of the fact that the agreements negotiated by Local 32J herein are and have been since 1972 facially neutral and non-discriminatory. The Lynch decision also involved the problem of remedial conflict, a significant aspect of the decision which plaintiff-intervenor failed to call to the attention of this Court:

> "There is at least a serious question as to whether the plaintiff unions may be legally liable directly to the male employee class for damages suffered from pension plan discrimination resulting from the collective bargaining agreements negotiated and entered into by the unions. This would place the unions in direct conflict with the interests of the class membership." 62 F.R.D. at 84.

Fair v. Southern Bell Telephone & Telegraph Co., 51 F.R.D. 543 (N.D. Ga. 1971), referred to by the Court in Lynch v. Sperry Rand Corporation, supra at 84, further articulates the nature of the remedial conflict involved in both the Communications and Lynch decisions. The Court in Fair, considering plaintiff's attempt to represent all of defendant's non-supervisory male employees, stated:

> "At the hearing on December 22, 1970, the court expressed some concern as to whether the plaintiff Fair, a non-supervisory male employee, properly can be a class representative in a suit such as this, when possibly there may be diverse interests as between the male employees and the female employees, and further, where the proper class possibly may include supervisory employees. The same problems exist even more acutely if the plaintiff union should seek to be the class representative in this litigation because of its fiduciary duty to represent impartially all of defendant's non-supervisory employees, male and female, which duty would, at least, be somewhat inconsistent with representing to the fullest only a single segment of those employees in adversary proceedings where the several segments may have diverse interests." Id. at 545.

The decision of Amalgamated Meat Cutters of North America v. Safeway Stores, Inc., 52 F.R.D. 373 (D. Kan. 1971), a case involving differentials between male and female employees within certain job classifications, is also invoked by plaintiff-intervenor and is similarly inapposite. No amount of mischaracterization by plaintiff-intervenor of the collective bargaining agreements which

underlie the case at bar can overcome the fact that the Amalgamated sex-based differential bears no relation to the neutral and non-discriminatory categories in the agreements herein. Moreover, the gravamen of the Amalgamated decision was the fact that counsel had appeared in that action in a dual capacity - that is, as attorney for both the union and its members. Plaintiff-intervenor's misrepresentations notwithstanding, such dual representation is not at issue herein.

POINT II

SHEA GOULD'S REPRESENTATION OF PLAINTIFFS HEREIN DOES NOT INVOLVE ANY CONFLICT OF INTEREST

Point II of plaintiff-intervenor's brief distills down to the question of whether Shea Gould has acted in consonance with Canon 6 of the Canons of Professional of Ethics, adopted by the American Bar Association on September 30, 1937. As stated therein:

> ". . . a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Plaintiff-intervenor misleads this Court by suggesting that the decision of Tucker v. Shaw, 269 F.Supp. 924 (E.D.N.Y. 1966), aff'd, 378 F.2d 304 (2d Cir. 1967), construes Canon 6 in a context similar to the one at bar. The Court in Tucker was confronted with an action brought by members of a union against officers thereof for alleged unlawful diversion of union funds and property. Pursuant to statutory prescription, the action was brought for the benefit of the union. The court held that the general counsel of the union was disqualified from representing the officers of the union:

> "The accusation directed against the officials is such as to establish them until the issues are adjudicated as potentially hostile to the interests of the union." Id. at 926.

Thus, if counsel had been permitted to continue to represent the officers, counsel would have been "exercising his not inconsiderable skills in behalf of those whose activities his statutorily coerced loyalty would require him to reprehend and assail, or at the very least would admonish neutrality." Id. at 927. The gravamen of the case is discernible in the Court's following statement:

> "It could indeed be, if the case as it unfolded were close and otherwise might go either way, that these very skills, coupled with access to records and a special familiarity with their content gleaned from years of representation of the Union, might provide a makeweight sufficient to turn defeat for the defendants into a victory that other counsel would not achieve. The plaintiffs, suing in right of their Union, are entitled not to be thus overmatched, nor is it a sufficient answer to assert that the Union is technically not a party to the suit nor likely to be. For its constructive presence is coextensive with its interest, and interested in the outcome it surely is." Id. at 927.

Since the attorney therein was general counsel to the union - a real party in interest although not technically a party plaintiff - and since that attorney was also representing the alleged defalcating officers of the union -

parties defendant to the action - said attorney might well have had to contend for that which duty to another client would have required him to oppose. In the case at bar, to the contrary, the members of Local 32J and Local 32J itself are consonantly aligned, having an identity of interest against those employers who failed to adhere to terms and conditions established by and set forth within collective bargaining agreements. This identity of interest is not impinged upon by spurious and unproven contentions that the collective bargaining agreements foster discrimination and that Local 32J accordingly shares liability for such discrimination. The authority invoked by plaintiff-intervenor simply fails to establish the existence of any tenable claim against Local 32J. Moreover, and assuming, arguendo, that some colorable claim does exist, Shea Gould has neither waived, prejudiced nor compromised any potential claim individual members may have against their association as an entity. Shea Gould has successfully endeavored to ensure that it would never find itself in a position where it would have to contend for that which duty to another would require it to oppose.

Plaintiff-intervenor also invokes the decision of In re Gopman, 531 F.2d 262 (5th Cir. 1976), in alleged

support of her contention that Shea Gould has violated the spirit of Canon 6, excerpted above. The Court refers to the conflict in Gopman as follows:

> ". . . the conflict arose when, on the one hand, the interests of appellant's union clients pointed towards disclosure, but, on the other hand, appellant was advising the individual witnesses as to whether disclosure should be made." Id. at 267.

The Court then refers to the subject matter of the action:

> ". . . the whole subject matter is books and records; that is the only thing that they [union officials] were asked to produce. And since the Union would want to have these books and records kept as the statute requires, it looks to me as though there is a potential conflict involved, because you have a declination to produce the records." Id. at 267.

If one looks to the subject matter of the underlying action at bar, one finds a claim predicated not upon a sex-based wage differential, as plaintiff-intervenor suggests, but upon a valid differential based solely upon carefully defined job content distinctions, which distinctions have been abused by employers of the members of Local 32J. We respectfully submit, therefore, that no conflict exists between Local 32J and its members. Assuming, arguendo, that some conflict did exist, it cannot be gainsaid - in view of both the beneficial settlement effected by Shea

Gould on behalf of the members of Local 32J and Judge Stewart's consequent approval thereof - that such purported conflict must be de minimis.* It is in this regard that we respectfully refer the Court to the following statement in In re Gopman, supra:

> "Certainly, these rights [First Amendment freedom of association and the various clients' Sixth Amendment right to obtain counsel of their choice] are important ones and will yield only to an overriding public interest. We do not indicate what merit, if any, appellant's arguments might have in a case where the ethical violation is relatively minor. We hold only that the public interest in a properly functioning judicial system must be allowed to prevail in the case presently before us. Appellant had placed himself in a clear conflict situation from which the district court had the duty to rescue both the lawyer and his clients." Id. at 268.**

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* Judge Stewart found the settlement referred to above "to be fair, equitable and appropriate" for his approval (Judgment, A 05). Although plaintiff-intervenor submitted a motion to intervene in this action to the District Court in October of 1975 which included allegations of conflict on the part of Shea Gould, Judge Stewart took no action with regard thereto. Meanwhile, Shea Gould, together with the Department of Labor and the defendants in the Equal Pay actions, negotiated the aforesaid settlement.

** The Court's statement that "the district court had the duty to rescue both the lawyer and his clients" from a conflict situation must be read in pari materia with its earlier statement to the following effect:

> "We also must remember that the court's discretion permits it 'to nip any potential conflict of interest in the bud', Tucker v. Shaw, 378 F.2d 304, 307 (2d Cir. 1967). On the record before this Court, it is clear that the possibility of a conflict had become great enough for the trial court to exercise its discretion." Id. at 266.

We respectfully ask this Court from what potential conflict situation our client need presently be rescued from? We believe the record emminently clear with regard to the fact that no potential conflict situation ever existed herein. If we have erred in that regard - and we firmly believe we have not - then surely the highly praised beneficial settlement which we effected on behalf of the members of Local 32J mandates the conclusion that any conflict herein was de minimis. In either event, we respectfully contend that entry of the disqualification order at bar was, with all due respect to Judge Stewart, an abuse of discretion.

CONCLUSION

Upon the foregoing facts and authority and upon the principal memorandum heretofore submitted by attorneys for plaintiffs-appellants, the District Court's order dated February 18, 1976, disqualifying Shea Gould from further representation of plaintiffs herein, should be reversed.

Dated: New York, New York
July 22, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Michael Lane, being duly sworn, deposes and says: that deponent is in the employ of Bar Press, Inc., printer for SHEA GOULD CLIMENKO & CASEY, attorneys for plaintiffs-appellants herein, is over 18 years of age, is not a party to this action, and resides at Brooklyn, New York.

On the 28th day of July, 1976, deponent served the within Reply Brief on (see attached list) attorneys for plaintiff-intervenor and defendants in the within entitled action, by depositing a true and correct copy of the same, properly enclosed in a postpaid wrapper in the official depository maintained and exclusively controlled by the United States Government at Howard and Lafayette Streets, directed to (see attached list) at (see attached list), that being the address designated by each of them for that purpose.

Michael Lane

Sworn to before me this
28th day of July, 1976.

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Notary Public
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